and known to be stolen as charged to an accused under Title 18 U.S.C. 2314. The various and sundry Circuit Courts throughout the land have had divergent views and opinions on the same.

Thus the questions presented are:

1. What is "market value" in accordance with **Title 18 U.S.C. 2314**, as defined by **Title 18 U.S.C. 2311.**

2. Whether the prosecution discharged the burden of proving as a matter of law the District Court's criminal jurisdiction in applying **Title 18 U.S.C. 2314.**

3. What are the limits of participation in a criminal trial by a District Judge which in and of themselves may not be prejudicial but when viewed cumulatively in the record reveal that a fair and impartial trial was not held? The question of degree of the trial court's participation.

4. The Federal Rules of Criminal Procedure in and of themselves were promulgated to guarantee to the citizens of the various states equal protection by the uniform administration of the criminal laws of the United States.

STATUTES INVOLVED

The pertinent portions of 18 U.S.C. 2311, 2314; and Rules 26, 30 and 46, Federal Rules of Criminal Procedure, 18 U.S.C.

STATEMENT

The instant case was commenced by the filing of an indictment in three counts charging the defendant-petitioner and one other with a substantive of crime in violation of Title 18 U.S.C. 2314, in one count; two other defendants with a substantive crime in violation of Title 18 U.S.C. 2315 in a second count, and a last count charging all four defendants with a conspiracy, (18 U.S.C. 371) to violate Title 18 U.S.C. 2314 and 2315 (R. pp. 1-3).

One defendant not the petitioner pleaded guilty to Counts I and III of the indictment. The remaining defendants were acquitted of Counts II and III of the indictment, and the petitioner was found guilty of Count I and Count III of the indictment. However, the conviction as to Count III of the indictment was reversed (*Herman vs. United States*, 289 F. 2d 362; App. A p. 1)

This petition will be addressed to the conduct of the trial court as concerns the petitioner's conviction of Count I.

In passing, it is respectfully called to the Court's attention that all objections in the record during the progress of the trial, whether made by any counsel for any of the respective defendants, was entered in the record as an objection for each individual defendant and therefore each defendant's rights were preserved in the respective objections (R., p. 100).

The trial itself was commenced on September 8, 1959, before the Honorable William C. Mathes, United States District Judge, (Southern District of California), and is

transcribed in some 718 pages (R. pp. 97-815) of the record. The trial was lengthy and, to say the least, the defendant's case was vehemently presented.

The record reveals an over-participation in the examination of witnesses by the trial court, which was recognized by the Appellate Court (*Herman vs. United States*, 289 F. 2d 362, at 366).

The trial judge exonerated the bail of the defendant in an arbitrary and capricious manner, and nothing is contained in the record as to the reason therefor (R. pp. 307-309 and 406).

Counsel for the defense was severely and constantly reprimanded by the trial court with no justification. Counsel for the government was hampered and at times the trial court removed the right to examination of witnesses from the prosecuting attorney. Under the pretext of investigating the application of the Court's jurisdiction, the trial judge constantly interrogated the prosecution witnesses where it appeared that the burden of proof charged to the prosecution had not been fulfilled. The trial court cemented the prosecution's cases so that apparent leaks therein would not be detrimental to a conviction if the same was had. The term "market value" within the definition thereon placed by the Court of Appeals for the Fifth Circuit (*Abbott vs. United States*, 239 F. 2d, 310-313, 1956) appeared to give the trial judge severe concern which led him to lead, encourage, explain and extract from the prosecution's witnesses the testimony needed to support a conviction, thus the Court overly participated in the proceedings. At one point it led the Court to instruct a witness as to the type of testimony that would help the

prosecution (R., pp. 122-123, 269-270, 277-280, 295-300, 327-328, 411-414, 421-422, 437-442, 456-459 and 488-491).

The trial court, in spite of the Federal Rules of Criminal Procedures in effect in all United States District Courts, constantly reiterated that his practices in his district were different, and that he apologized for requiring counsel to try the cause in a pattern in which he was familiar. This apologetic nature carried through to the jury instructions (R. pp. 304-305 and 839). This conduct appears to have been condoned by the Appellate Court (*Herman vs. United States, supra*, at 366).

It is of interest to note that the Appellate Court read into the record below a factual condition which was never proven or presented, the "general retail value" (*Herman vs. United States, supra*, at 366). Thus modifying its previous decision (*Abbott vs. United States, supra*) by allowing conjecture to play an important role in establishing the Federal Court's jurisdiction. Nothing in the record before the trial court reveals that the merchandise involved was in a condition to be sold and consumed in a retail market. In fact,. the record reveals that the merchandise involved was used, sample merchandise, of various vintages which had to be processed further and that it could not be sold without a buyer being located; and that no such buyer was available at the time and place of the theft or at the time and place of its arrival in the Miami, Florida area (R. pp. 197, 257, 258, 300, 457 and 458).

The culmination of the trial found the trial court recognizing its prejudice and partiality and it attempted to give lip service to the general protective legal principles

afforded a defendant in the instructions rendered to the jury, but the overbearing and lengthy instructions did, in fact administered to the defendant his *coup de grace* (R., pp. 815-845).

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed as it appears to be in conflict with earlier decisions rendered in the same Circuit and it further creates a divergence and conflict among the various and sundry decisions rendered in other Circuits. It appears to create a conflict with applicable decisions which interpret and define "market value" as set forth in Title 18 U.S.C. 2311, and subsequent sections of the same Chapter.

The entire record presents a problem in the administration of judicial procedures creating a departure from the accepted and usual course of the same, necessitating an exercise of this Court's supervision in regard to the question of degree of participation and limitation of a Trial Judge in proceedings before him so as to affect the Constitutional guarantees of a fair and impartial trial to which every defendant in criminal proceedings is entitled.

Lastly, this Court's supervision must be applied regarding the method in which the Federal Rules of Criminal Procedure are utilized in customary practice within the various District Courts. This presents a question of equal protection in the procedural administration of the criminal laws of the United States. In eitner of these events this Court should grant review.

1. **Title 18 U.S.C., Sec. 2311** defines "value" as follows:

> "'Value' means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof. (June 25, 1948, c. 645, 62 Stat. 805.)"

The various and sundry Circuit Courts have implemented the statutory definition of "value" in light of the Congressional intent. The Fifth Circuit Court has applied the rule of "market value". (*Abbott vs. United States*, 239 F. 2d 310 at 313.)

Other Circuits have applied the rule, where the records substantiate the same, of "retail value". (*Gordon vs. United States*, 164 F. 2d 855, 6th Cir. 1947; *Husten vs. United States*, 95 F. 2d 168, 8th Cir. 1938).

It appears that the Sixth Circuit approves a rule that the value of the goods at the time and place they were stolen and or taken the condition in which they were stolen or taken are the basis for evaluating their worth for the purposes of applying the judicial standard of the District Courts within the Sixth Circuit. (*Stern vs. United States*, 204 F. 2d 647, 6th Cir. 1953, *cert. denied*, 345 U.S. 907, 73 S.Ct. 1140, 97 L.Ed. 1404, *rehearing denied*, 346 U.S. 842, 74 S.Ct. 16, 98 L.Ed. 63.)

Thus the decision, in order to substantiate the conviction, utilizes the conglomeration of decisions both in and out of the Circuit, though the record in the Trial Court clearly reveals that the merchandise involved had

not been fabricated to a state where it was ready for distribution to the retail market. In fact, the merchandise was old used samples which was in need of additional fabrication, (R. pp. 197, 198, 226, 227), and to support its partial affirmance of the Trial Court, the Opinion cites a departure that general retail value would naturally include a reasonable markup and evidence of the retail value of the goods is properly admissible regardless of the trial record. (*Herman vs. United States*, *supra*, at 366).

It therefore appears that whether or not willing buyers are available to bargain with willing sellers in a formal or informal market is immaterial, and that the condition of the merchandise at the time it was stolen or lost is not a factor; that to replace these previous judicial determinations "general retail value" can be taken into consideration. Thus conjecture is apparent inasmuch as "general retail value" naturally includes a reasonable markup. Thus the Congressional intent has been disregarded and the Federal Courts, which are courts of severe limited jurisdiction, can extend the same by the loose approach to the "value" problem, thereby, creating a situation rank with diversity as to application of each District Court's jurisdiction thus necessitating this Court to exercise its judicial power of supervision.

2. The Federal Courts are courts of limited civil and criminal jurisdiction and parties, whether they be plaintiffs or prosecutors, are burdened with establishing as a matter of law the applicability of the jurisdiction of the Federal Courts. (*McNutt vs. General Motors Acceptance Corp.*, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135; *KVOS, Inc. vs. Associated Press*, 299 U.S. 269, 57 S.Ct. 197, 81 L.Ed. 183.)

This problem of jurisdiction asserts itself in every case coming before any court comprising the federal judicial system. (*Mansfield, Coldwater & L.M.R. Co. vs. Swann*, 111 U.S. 379 at 382, 4 S.Ct. 510 at 511, 28 L.Ed. 462). This burden must be discharged by the party invoking the court's jurisdiction as a legal matter, and it is the duty of the prosecution in a criminal matter to discharge this burden beyond a reasonable doubt. The District Judge before whom a criminal trial is had cannot, under the guise of making a determination as to whether or not the criminal jurisdiction of his court is invoked properly, participate in the trial as co-counsel for the Government to establish this fact as a matter of law, for once it actively participates it is detrimental to the defendant and the latter cannot be afforded a fair and impartial trial.

The matter of discretion can be abused; the question of discretion is apparent, and the trier of the fact becomes the prosecutor, for it is his duty to determine on the sufficiency of the evidence whether or not the fact of the application of the jurisdiction of the court is to be presented to the jury. The court cannot hold a twofold purpose in the trial for it loses its impartiality and fairness.

The Opinion below recognizes that the Trial Court overly participated more actively one way or another than is customary. (*Herman vs. United States, supra*, at 366).

As cited elsewhere in the petition the tone and nature of the participation is apparent from the record. However, the exoneration of bail by the Trial Court with no reason therefor (R. pp. 307-310 and 403-406) other than an expression of the arbitrary and capricious attitude of the Trial Judge is not in accord with Rule 46 of the Federal

Rules of Criminal Procedure and the spirit of the administration of criminal jurisprudence in the Federal Courts. (*Fernandez, et al vs. United States*, __ U.S. __ 81 S.Ct. 642 at 645, __ L.Ed. __).

In view of the participation in the interrogation of witnesses, the exoneration of bail, the over-bearing and lengthy instructions to the jury (R. pp. 815-844), and the question of the combined effect of the judge's conduct in relationship to the fair and impartial trial presents the problem of degree. How far can the Trial Court proceed under the guise of "moving the case along", or seeking as a "matter of law" the application of its jurisdiction.

The entire record compositely must be weighed, that isolated instances cannot support isolated conduct, that one specific occurence in a trial must be linked to another, and the entire record must be weighed in regard to fairness and impartiality. What is the impact of the cumulative record upon the defendant's Constitutional guarantee? What is the question of the application of degree? To what degree can the Trial Judge proceed before the defendant has been relieved of his Constitutional right?

These are questions that only this Court in its supervisory capacity can discharge.

In times as these where tyranny is prevalent and the sole safeguards against tyranny in the western world are the courts, can one tolerate the exercise of tyranny in the District Courts of the United States.

As James Jones has said:

"'I understand it.'

"'No you don't. Every man's supposed to have certain rights.'"

"'Certain inalienable rights,' Starke said, 'to liberty, equality and the pursuit of happiness. I lernt it in school as a kid.'"

"'Not that,' Prew said. 'That's the Constitution. Nobody believes that any more.'"

"'Sure they do,' Starke said. 'They all believe it. They just don't do it. But they believe it.'"

"'Sure,' Prew said. 'That's what I mean.'"

"'But at least in this country they believe it,' Starke said, 'even if they don't do it . . .'"

(*Volume I, World of Law*, xvii, Ephriam London, 1960)

3. Lastly, the problem which is unique, and perhaps novel and new, is admitted by the decision below and by the Trial Judge. It leaves the practitioner bewildered, for in modern times much has been attempted by the courts and by the Bar to simplify procedures and to make them uniform in the Federal Courts. However, the record is replete at the trial (and need not be reiterated here) of the apologies of a District Judge of one District holding court in another District as to what customary Federal criminal procedures governs the trial of the cause. (*Herman vs. United States, supra*, at 366).

The Opinion below gives some sanction to over-participation at a trial by a Judge if that procedure is customary within the District Court of a given Circuit wherein the District Judge presides. What is proper in one Circuit may not be proper in another Circuit. What can be considered in one Circuit as a Trial Judge assuming the role of prosecuting attorney will not be considered so in another Circuit, and when District Judges are assigned to Courts other than in their own Circuit it appears that the prevailing rules of the home Circuit are applicable. Does equal protection under the laws of the land guaranteed by the Constitution of the United States to each and every defendant remain inviolate in face of this unique application of the procedural administration of the criminal laws of the United States?

It appears that once again, under the pain of repetition that this Court's supervisory authority must be called upon.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the petition for this writ of certitorari should be granted.

Dated this 18th day of August, 1961.

IRVING M. WOLFF
Attorney for Petitioner
1204 Biscayne Building
Miami 32, Florida

CERTIFICATE OF SERVICE

Service of the foregoing petition for writ certiorari in the United States Court of Appeals for the Fifth Circuit was had on this 18th day of August, 1961, by forwarding the same to the Solicitor General of the United States, Department of Justice, Washington, D. C. by airmail.

IRVING M. WOLFF

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18012

GEORGE HERMAN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(April 12, 1961.)

Before TUTTLE, Chief Judge, and RIVES and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: The appellant, George Herman, questions the fairness of the trial below, as well as the adequacy of the government's proof to establish the elements essential for conviction.

May 18 or May 19, 1958, Jack Heffron, president and director of Norelle Jewelry Company, went to the Union Station at St. Louis, Missouri, to start on a sales trip. He had with him a salesman's jewelry case containing various samples of rings and mountings. He gave the case to a red cap. The red cap placed it on a hand truck. Heffron walked to one of the ticket windows to buy a ticket. He turned his head. In that instant the case disappeared. Heffron, the red cap, the railroad police, and the St. Louis police began a search. They found no sample jewelry case.

May 20, 1958, at 1:30 a.m., George Herman and Howard Selander checked into the Mar-Jes Motel in West Memphis, Arkansas. This motel, about 300 miles from St. Louis, is on United States Highway 61, the main artery leading from St. Louis, Missouri, to Memphis, Tennessee. About nine o'clock that morning Herman and Selander went to the Railway Express Agency in Memphis. Using the name "Ben Cohen," Herman told one of the Express Agency employees that he wished to send a sample jewelry case to the Cut Rate Gift Shop in Fort Lauderdale, Florida. (The Government's Exhibit #1 was identified as the sample case Herman sent—and as Heffron's missing sample case.) At the trial, the Agency employee identified both Herman and Selander. He testified that Herman made out address tags as requested, and that Herman said that the case contained jewelry valued at $150. When the agent informed Herman that because the value exceeded $50 the Money Department of the Agency would have to handle the shipment, Herman replied that the value actually was no more than $50, since the jewelry was cos-

tume jewelry only. The agents made out delivery receipts and attached seals to the case, using identical numbers on the delivery receipts and seals, as is customary. The agent in charge of the Money Department stated, from his record, that the jewelry case left Memphis the same day, headed for Fort Lauderdale on board the St. Louis San Francisco train No. 105 at 10:30 a.m.

A special agent of the F.B.I. recognized Herman and Selander when he saw them standing on a street in Memphis about a mile away from the Railway Express Station. One hour later, and 75 miles away, they were arrested for speeding.

At the time of shipment, Herman appeared to have a full head of hair. A few hours later, after his arrest by the Mississippi Highway Patrol for speeding, he flushed a wig down the toilet in the Union County jail in New Albany, Mississippi. Witnesses testified that when they saw Herman in the Railway Express Office he had a full head of hair; but when they saw him later the same day, he was bald.

May 23, 1958, a Railway Express Agency employee in Fort Lauderdale, Florida, delivered the sample case to the Cut Rate Gift Shop. Oscar Slofsky initialed the delivery receipt, or waybill, and accepted the sample case. The seals were intact when Slofsky received the case, and the seal numbers tallied with the numbers recorded on the waybill. That same day, at the request of the F.B.I., Heffron identified this sample case and its contents as the property he had lost in Union Station.

Count one of the indictment charges George Herman and Howard Selander with wilfully causing the jewelry case to be transported in interstate commerce, in violation of 18 U.S.C.A. §2314.[1] Count two charges Oscar Slofsky and Jack Rapaport, co-owners of the Cut Rate Gift Shop, with receiving goods shipped in interstate commerce knowing them to have been stolen, in violation of 18 U.S.C.A. §2315.[2] Count three charges Herman, Selander, Slofsky, and Rapaport with conspiracy to violate 18 U.S.C.A. §2314 and §2315, in violation of 18 U.S.C.A. §371. The conspiracy count alleges two overt acts: (1) Herman and Selander met and conferred in Memphis, May 20, 1958, and (2) Slofsky and Rapaport received the jeweler's case from Memphis, May 23, 1958.

The case was tried before Judge William C. Mathes, United States District Judge, Southern District of California, then assigned to the Southern District of Florida. Judge Mathes struck the first overt act from the indictment on his own motion. Selander pleaded guilty to counts one and three of the indictment. Neither the government

---

[1] "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . . Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. . . ." 18 U.S.C.A. §2314.

[2] "Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, ving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; . . . Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. . . ." 18 U.S.C.A. §2315.

nor the defendants called him to testify. The jury acquitted Slofsky and Rapaport, with respect to counts two and three. Herman, however, was found guilty of counts one and three.

I.

Herman contends, first, that he did not receive a fair and impartial trial. He asserts that the trial judge unnecessarily and persistently cross-examined the witnesses and interfered with the progress of the trial, to the advantage of the government and in deprivation of the defendant's rights.

A trial judge "should never assume the role of prosecuting attorney and lend the weight of his great influence to the side of the government." *Hunter v. United States*, 5 Cir., 1932, 62 F. 2d 217, 220. In our system of administering justice the functions of the trial judge and the prosecuting attorney are separate and distinct; they must not be confused. The trial judge has a duty to conduct the trial carefully, patiently, and impartially. He must be above even the appearance of being partial to the prosecution. *Blumberg v. United States*, 5 Cir., 1955, 222 F.2d 496, 501; Zebouni v. United States, 5 Cir., 1955, 226 F.2d 826.

Granted this, the record fails to support Herman's charges. The trial judge did break into the examination of witnesses with questions of his own and he did examine some of the witnesses at length. This is proper enough, within the exercise of a reasonable discretion. We find

that the trial judge asked defendant's witnesses relatively few questions. Almost all of his questions were directed to the government's witnesses, and these were primarily aimed at a jurisdictional matter—the determination of the qualifications of the jewelry experts and the value of the jewelry sample case. We do not approve of a trial judge asking so many questions that he appears to take the case away from the attorney, but here we cannot say that he was more interested in one side of the case than he was in the other or that he was unfair to the defendant.

The record shows that the trial judge reprimanded the defense counsel. He also reprimanded the prosecutor. The record fails to indicate any bias or prejudice in either set of reprimands.

Herman attacks the exoneration of the defendants' bail during the course of the trial. This took place outside the jury's presence. The trial judge stated to counsel that the exoneration had nothing to do with the jury or the conduct of counsel. It was within his discretionary power to exonerate the bail as he did. Rule 46, Fed. R. Crim. P.

To our minds, the record as a whole indicates that the trial judge participated in one way or another more actively than is customary, but with no bias or prejudice toward either side that would render the proceedings unfair. What may be customary in one district or circuit, of course, may not be customary in another district or circuit. Here if anyone was badgered—we do not say that anyone was—it was the United States attorney.

II.

To constitute a violation of 18 U.S.C.A. §2314, the "value" of the items transported must be $5,000 or more. The "value" as defined in 18 U.S.C.A. §2311, means "the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof." Two experts testified for the prosecution that the market value of the jewelry in the sample case exceeded $5,000. The defendants presented witnesses who testified that the market value was $4,800 and $4,408.94, *without any mark-up*. Herman contends that the government's witnesses employed the wrong test or formula in arriving at their value.

The standard test for determining market value of stolen property is the price a willing buyer would pay a willing seller at the time and place the property was stolen. "[M]ere cost of production, cost of replacement, value to the owner, value to one who might have use of it under certain circumstances, whatever else it might be, is not market value. For that value—market—depends on a market, whether formal or informal, in which willing buyers bargain with willing sellers." *Abbott v. United States*, 5 Cir., 1956, 239 F.2d 310, 313. The government's experts computed the value of the goods as cost plus mark-up, while the defense witnesses computed their value as cost of production alone. General retail value would naturally include a reasonable mark-up. Evidence as to retail value

of the goods is therefore properly admissible.[1] *Gordon v. United States*, 6 Cir., 1947, 164 F.2d 855; *Husten v. United States*, 8 Cir., 1938, 95 F. 2d 168.

We read the language "aggregate value of all goods" as contemplating the sum of the values of the individual articles, and not the lump sum value of all the articles as a single whole. The government experts, therefore, properly computed the unit value (cost of production plus mark-up) and multiplied by 900 rather than estimating the market value for 900 rings in one sale. Substantial evidence shows that the jewelry case and jewelry contained in it were worth more than $5,000.

III.

The defendant contends that the government did not meet its burden, under 18 U.S.C.A. §2314, of proving beyond a reasonable doubt that he *knew* the goods were stolen. We find that the jury could have inferred guilty knowledge from his checking into the motel under an as-

[1]"It is uniformly held that the value of the stolen property is the market value at the time and place of taking if it has a market value. People v. Gilbert, 163 Mich. 511, 128 N.W. 756, Ann. Cas. 1912A, 894; Robinson v. State, 107 Neb. 591, 186 N.W. 977; Cunningham v. State, 90 5 ex. Cr.R. 500, 136 S.W. 89; 17 Ruling Case Law 66, §71; 36 Corpus Juris 883. The trial court charged that, in the present case, that would be the retail market value. These rings were of the same character and quality as those sold to jewelers upon them as samples. Mr. Kraus dealt with the retail trade, which bought his rings for the purpose of sale at retail. They had an individual retail market value, and the entire lot were susceptible of valuation as such. In such case the retail value should prevail over the wholesale or replacement value, and there is here presented no situation which would warrant consideration of the value at wholesale or for replacement. . ." Husten v. United States, 8 Cir., 1938, 95 F.2d 168, 171.

sumed name, shortly after the case was stolen; the circumstances connected with his shipping the case from Memphis, especially his changing the stated value of the bag's contents after the clerk's questions; and, of course, flushing his wig down the toilet after his arrest later that day. Unexplained possession of the fruits of the crime, shortly after its commission, justify the inference that the possession is guilty possession. Such evidence is no more than prima facie evidence of guilt, but it may control if it is not explained by circumstances consistent with innocence. See *Barfield v. United States*, 5 Cir., 1956, 229 F.2d 936; *Hosten v. United States*, 8 Cir., 1938, 95 F.2d 168. We find no such justifying circumstances here.

There is no problem here of instructions improperly placing the burden of proving his innocence on the possessor of recently stolen goods. See *United States v. Allegracci*, 3 Cir., 1958, 258 F.2d 70. The district court carefully instructed the jury that "possession of property recently stolen not satisfactorily explained is a circumstance from which the jury may reasonably draw the inference and find that the person in possession knew the property had been stolen. The same inference may reasonably be drawn from a false explanation of such possession. Possession in one state of property recently stolen in another state, if not satisfactorily explained, is a circumstance [from] which the jury might reasonably infer and find in the light of surrounding circumstances that the person in possession knew it to be stolen property." This is a fair and lucid statement of the law. *Bollenback v. United States*, 1946, 326 U.S. 607, 616, 66 S.Ct. 402, 90 L.Ed. 550.

Herman argues that the district court compounded confusion by failing to distinguish between a presumption and an inference in instructing the jury that a "presumption is an inference which the law requires a jury to make from particular facts in the absence of convincing facts." With regard to the delivery of the jewelry sample case from Memphis to Fort Lauderdale by the Railway Express Agency, the trial judge instructed the jury that there is a presumption "that the ordinary course of business has been followed, that things have happened according to the ordinary course of nature and the ordinary habits of life and that the law has been obeyed." The distinction between a presumption as a mandatory deduction, and an inference as a permissible deduction, seems clearly to have been made in the trial judge's definition and in his statements to the jury.

IV.

There is merit to the defendant's contention that no overt act was proved to support his conviction of a conspiracy under count three.

To complete the crime of conspiracy at least one of the conspirators must be charged with the performance of at least one overt act in furtherance of the conspiracy. *Schnautz v. United States*, 5 Cir., 1959, 263 F.2d 525; *Pinkerton v. United States*, 5 Cir., 1945, 155 F.2d 499, 501, aff'd 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489. See *United States v. Falcone*, 1940, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128; *Rent v. United States*, 5 Cir., 1954, 209 F.2d

893. In this case two overt acts were originally charged. The first overt act was the meeting of Herman and Selander in Memphis, Tennessee. The second overt act was the receipt of the jeweler's case by Slofsky and Rapaport in Fort Lauderdale. Because the meeting of Herman and Selander in Memphis occurred outside the trial court's district and outside the district of the grand jury that returned the indictment, the trial judge instructed the jury during the course of the trial that even if they found that the meeting took place they nevertheless "may not consider that as satisfying the over act requirement." But he told them that they could consider the meeting in Memphis to determine whether a conspiracy was formed, and if so, who were members of it, although the act itself could not satisfy the requirements to complete the crime of conspiracy. This instruction is entirely proper. *Crosby v. United States*, 5 Cir., 1956, 231 F.2d 679, cert. den. 352 U.S. 831, 77 S.Ct. 46, 1 L.Ed.2d 52, reh. den. 352 U.S. 955, 77 S.Ct. 322 1 L.Ed.2d 245; *United States ex rel Kraus v. Humphrey*, 3 Cir., 1949, 174 F.2d 741, cert. den. 337 U.S. 948, 69 S.Ct. 1508, 93 L.Ed. 1750; *Woitte v. United States*, 9 Cir., 1927, 19 F.2d 506, cert. den. 1927, 275 U.S. 545, 48 S.Ct. 84, 72 L.Ed. 417; *United States v. Baker*, 1917, D.C. R. I., 243 F. 741.

Thus, after the trial judge expunged the meeting in Memphis as an overt act, the sole overt act left to support the conspiracy was the alleged receipt by Slofsky and Rapaport of the jeweler's case sent from Memphis. The rub comes in the acquittal of Slofsky and Rapaport. There was

only one overt act to support count three. Slofsky and Rapaport were the only persons charged in that overt act. They were acquitted. Consequently, so Herman argues, no overt act was proved to support the conspiracy conviction. But the verdict of the jury does not mean that the overt act did not occur; it means merely that the jury did not find Slofsky and Rapaport guilty of the commission of an offense. Such a finding does not make the act itself disappear.[4] But even though the facts do not disappear, an essential element for conviction of conspiracy *has* disappeared: the necessity that the overt act be performed *by one of the conspirators.* A conspiracy cannot be committed by a single individual acting alone; he must act in concert with at least one other person. The acquittal of one conspirator would thus be immaterial where there are several other named conspirators, or other conspirators charged but unknown to the jury. But where all but one

[4]The error in Herman's reasoning is his failure to recognize that the overt act in support of a conspiracy need not be unlawful itself. It may be a completely innocent act. Poliafico v. United States, 6 Cir., 1956, 237 F.2d 97, cert. den. 352 U.S. 1025, 77 S.Ct. 590, 1 L.Ed. 2d 597, reh. den. 353 U.S. 931, 77 S.Ct. 718, 1 L.Ed. 2d 725; United States v. Stromberg, D.C.N.Y., 1957, 22 F.R.D. 513. Furthermore the verdicts were returned by the same jury after a single trial in which all of the defendants were tried together. Had these been separate and subsequent trials the doctrine of res judicata might be applicable. Yawn v. United States, 5 Cir., 1957, 244 F.2d 235; Sealfon v. United States, 1948, 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180. But where the same jury returns both verdicts in a single trial, the facts determined by an acquittal of one party do not preclude conviction of another party based on the same facts. United States v. Marcone, 2 Cir., 1960, 275 F.2d 205; Schaefer v. United States, 8 Cir., 1959, 265 F.2d 750. See United States v. Coplon, 2 Cir., 1950, 185 F.2d 629; United States v. Austin Bagley Corp., 2 Cir., 1928, 31 F.2d 229, cert. den., 1929, 279 U.S. 863, 49 S. Ct. 479, 73 L.Ed. 1002; Annot., 92 L.Ed. 185. Cf. Dunn v. United States, 1932, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356. We recognize the rule, but do not reach that question here.

of the charged conspirators are acquitted, the verdict against the one will not stand. See 11 Am. Jur. Conspiracy §26. Similarly, where the substantive offense is the overt act supporting conviction on the conspiracy count, an acquittal of the substantive offense operates as an acquittal of the conspiracy count, if the acquittal of the substantive offense constitutes a determination that the overt act was not committed. Re Johnston, 3 Cal. 2d 32, 43 P 2d 541; *Oliver v. Superior Court*, 92 Cal. App. 94, 267 P. 764. But where the acquittal of the substantive offense does not necessarily constitute a determination that the overt act was not committed the acquittal does not preclude a conviction of the conspiracy count. *Rothman v. United States*, 2 Cir., 1920, 270 F. 31, cert. den. 254 U.S. 652, 41 S.Ct. 149, 65 L.Ed. 458; *Allen v. United States*, 4 Cir., 1937, 89 F.2d 954. In this case the jury decided that Slofsky and Rapaport were not conspirators. That finding erased the slate of any overt act performed by a conspirator. Consequently count three falls for failure to prove an overt act—performed by a conspirator—to support the conspiracy.

Herman was sentenced to nine years' imprisonment as to count one, the substantive crime, and to five years' imprisonment as to count three, the conspiracy, with the sentences commencing and running concurrently. Since the sentences run concurrently, our reversal of the conviction of conspiracy in no way affects the sentence of nine years' imprisonment imposed for conviction of the substantive crime. *Benham v. United States*, 5 Cir., 1954, 215 F.2d 472. See *Blitz v. United States*, 1894, 153 U.S. 308,

14 S.Ct. 924, 38 L.Ed. Cf. *DeJianne v. United States*, 3 Cir., 1922, 282 F. 737, 742.

V.

Notwithstanding our holding on the conspiracy charge, we have no authority to reduce or to strike the $10,000 fine. Under 28 U.S.C.A. §2106 an appellate court may "affirm, modify, vacate, set aside or reverse a judgment . . . and may remand the cause and direct the entry of an appropriate judgment", but the appellate court has no authority to modify a sentence that is within the limits allowed by the applicable statute. *Smith v. United States*, 10 Cir., 1959, 273 F.2d 462, cert. den. 363 U.S. 846, 80 S.Ct. 1619, 4 L.Ed.2d 1729; *United States v. Kapsalis*, 7 Cir., 1954, 214 F.2d 677, cert. den. 349 U.S. 906, 75 S.Ct. 583, 99 L.Ed. 1242. The nature of the sentence rests in the discretion of the court below, and is not reversible by this Court where the punishment assessed is within the statutory limits. *Freeman v. United States*, 9 Cir., 1917, 243 F.353, 357. Since the trial judge did not impose a separate fine for each count, we must hold that the single fine is referable to the conviction on the substantive offense, which carries a maximum fine of $10,000, 18 U.S.C.A. §2314. "[T]he presumption of law is that the court awarded sentence on the good count only."[5]

[5]Classen v. United States, 1891, 142 U.S. 140, 147, 12 S.Ct. 169, 35 L.Ed. 966. See Pinkerton v. United States, 1946, 328 U.S. 640, 641, 642 note 1, 66 S.Ct. 1180, 90 L.Ed. 1489; Hirabayashi v. United States, 1943, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774; Abrams v. United States, 1919, 250 U.S. 616, 619, 40 S.Ct. 17, 63 L.Ed. 1173; Reese v. United States, 6 Cir., 1926, 14 F.2d 606, cert. den. 273 U.S. 739, 49 S.Ct. 333, 71 L.Ed. 867.

VI.

We have examined the instructions of the judge. We do not find them overbearing and confusing and conflicting, as Herman contends. Nor do we find them misleading as to the government's burden of proof. We have considered all of the appellant's contentions, whether discussed in this opinion or not, and have concluded that, except as discussed, there was no prejudicial error in the proceedings below. We hold that the trial was fairly and impartially conducted, and the evidence of guilt to support count one was substantial. Thus, the judgment of conviction as to count one is affirmed. The judgment of conviction as to count three is reversed.

Judgment AFFIRMED in part, REVERSED in part, and REMANDED for final disposition.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES
Deputy

New Orleans, Louisiana
July 10, 1961.

(SEAL)

JUDGMENT.

Extract from the Minutes of April 12, 1961

No. 18012.

GEORGE HERMAN,

versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and it is hereby, remanded to the said District Court for final disposition in accordance with the opinion of this Court.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 18,012

GEORGE HERMAN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(June 21, 1961)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, RIVES, and WISDOM, Circuit Judges.

PER CURIAM:

It is ordered that the petition for rehearing filed in the above styled and numbered cause be, and the same is hereby DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18,012

GEORGE HERMAN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from June 21, 1961; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from June 21, 1961 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court deny-

ing the writ, or upon the expiration of thirty days from June 21, 1961, unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s JOHN MINOR WISDOM
United States Circuit Judge.

Dated: **ORDER STAYING MANDATE. FILED: July 7, 1961.**

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 18012

GEORGE HERMAN,

Appellant,

UNITED STATES OF AMERICA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a further stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is further stayed to and including August 20, 1961, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay

granted herein, unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

s/ JOHN MINOR WISDOM
UNITED STATES CIRCUIT JUDGE

Dated: **ORDER FURTHER STAYING MANDATE, FILED: July 17, 1961.**

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. , October Term, 1961

GEORGE HERMAN,

Petitioner,

vs.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 20th, 1961

s HUGO L. BLACK
Associate Justice of the Supreme Court of the United States.

Dated this 12th day of July, 1961